No. 968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

STATE OF NEW YORK,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, the State of New York, appeals from the judgment of the United States District Court for the Western District of New York dismissing appellant's complaint to set aside and annul an order of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion and order of the United States District Court for the Western District of New York, dated July 14, 1966, are reported as *State of New York* v. *United States*, 256 F. Supp. 634 (1966) and are attached hereto as Appendix A. The report and order of Division 2 of the

Interstate Commerce Commission, dated February 24, 1964, *Grain, Pittsburgh, Pa., to Eastern Base Points,* are reported at 322 I.C.C. 218. The report and order of the entire Commission on reconsideration, dated July 26, 1965, *Grain, Pittsburgh, Pa., to Eastern Base Points,* are reported at 325 I.C.C. 669.

Jurisdiction

This action was brought before the United States District Court for the Western District of New York under 28 U.S.C. § 1336 to set aside and annul an order of the Interstate Commerce Commission. The order of the district court dismissing the complaint was entered on July 14, 1966. Notice of appeal was filed in that court on September 12, 1966, and enlargements of time for docketing said appeal were granted until January 13, 1967. The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *United States* v. *Drum,* 368 U. S. 370.

Statutes Involved

The statutes involved in this case are: Judicial Code, 28 U.S.C. §§ 1253, 2101(b), 1336; Interstate Commerce Act, National Transportation Policy (49 U.S.C. preceding § 1) and §§ 1(5), 3(1), 4(1), 15(7) and 15a(2), 49 U.S.C. §§ 1(5), 3(1), 4(1), 15(7), 15a(2). The text of these statutes is set forth in Appendix B hereto.

Questions Presented

The district court dismissed the complaint against the decision and order of the Interstate Commerce Commission which found reduced rail rates on grain and grain products from Pittsburgh, Pa., to nine Eastern base points in trunk-

line territory* to be just and reasonable and otherwise lawful. The reduced rates, which are lower than the rates from all other points adjoining Pittsburgh and on a lower basis than the rates from most Central Freight Association ("C.F.A.") territory origins** to the same destinations, were published to induce the establishment of a grain-milling industry at Pittsburgh. The questions presented are:

1. Whether the district court erred in relying on the "judgment of the . . . tribunal appointed by law and informed by experience" without making any pertinent finding concerning the question of whether said judgment was based upon substantial evidence of record?

2. Whether the district court erred in failing to conclude that the judgment of the Interstate Commerce Commission was not based upon substantial evidence of record after the district court had apparently conceded that the Interstate Commerce Commission had failed to consider certain pertinent facts of record?

3. Whether the district court erred in concluding, in effect, that the proponents of the changed rates involved had met their burden of proof under Section 15(7) of the Interstate Commerce Act (49 U.S.C. § 15(7))?

Statement of the Case

The rail grain-rate structure, along with milling-in-transit arrangements, is so set up that any mill along a route intermediate between the origin of the wheat in the

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* Rochester, Syracuse, Utica, Albany and New York, N. Y.; Philadelphia, Pa.; Baltimore and Cumberland, Md.; and Norfolk, Va.

** Roughly the area bounded by the Mississippi and Ohio rivers, the Great Lakes, and an imaginary line extending between Buffalo and Pittsburgh.

West and the destination of the product in the East can obtain the benefit of the same through rate from origin to destination (R. 468-469). The rates from the vast wheat-producing areas west of the Missouri River to the East are all made on rate-break combinations over the Missouri River crossings to the Chicago, Peoria, Ill., and St. Louis, Mo., gateways plus the rate factors of the Eastern railroads east of the gateway (R. 475).

The rail rates on the eastbound movement of grain and grain products from C.F.A. territory (including Pittsburgh, but not Buffalo) have historically been made on a modification of the so-called "McGraham formula" which was approved by the Commission in *Michigan Percentage Cases*, 47 I.C.C. 409 (1917). That formula was predicated on a key rate from Chicago, Ill., to New York, N. Y., with the rates from origins other than Chicago reflecting percentages of the Chicago-to-New York rate and the rates to destinations other than New York differentially determined by fixed percentages or arbitraries above or below the formula rates to New York. See *Cooperative Grain League Federation Exch., Inc.* v. *Akron, C. & Y. R. R.*, 323 I.C.C. 174, 179-182 (1964). Although some variations have taken place in the intervening years to meet particular competitive situations, the relationship between the various origin groups has generally been maintained.

Under the McGraham formula, the local rates on grain and grain products from Pittsburgh to New York were supposed to be 60% of the basic Chicago-to-New York rate, but the rates from 66½% territory (Youngstown-Ashtabula, Ohio, area) were observed as minima from Pittsburgh, because the movement of grain and grain products from Pittsburgh to the East has been relatively small and virtually all of the traffic has been subject to transit privileges which require the application of through rates from origins in Ohio and west thereof. The propriety of the Pittsburgh rates had not been challenged (App. A3, footnote 1).

In addition to the basic local rates from origins in C.F.A. territory to the Eastern base points, there are in effect lower "proportional," "reshipping" and "ex-lake" rates from the Western gateways and Great Lakes ports to the East. Competition with all-water routes from the West brought about the establishment from Buffalo to the East of ex-lake rail rates on a depressed basis. These rates were arbitrarily made and were in response to particular conditions at Buffalo. See *Buffalo Grain Cases*, 46 I.C.C. 570 (1917). The ex-lake principle subsequently spread to other Lake ports.

Since Pittsburgh is not an important gateway in the marketing of grain products and since there are no feasible water routes from Pittsburgh to the Eastern base points, the former rates and the present reduced rates from Pittsburgh to points in Trunk-line territory are *local* rates, not proportional, reshipping or ex-lake rates.

There are presently no flour mills of any consequence located at Pittsburgh. A consultant was hired by the Mellon National Bank and Trust Company in 1961 to formulate a plan for the development of the Pittsburgh area. His initial formula is for the birth of a grain industry in that city. One flour miller, Bay State Milling Company, indicated it would construct a riverside mill at Pittsburgh if the rates from that point to the Eastern base points in Trunk-line and New England territories were reduced. Bay State now has flour mills at Red Wing and Winona, Minn., Leavenworth, Kans., and Clifton, N. J. The consultant to the Mellon Bank arranged for Bay State's president to be introduced to the principal rate officers of the three major railroads serving the Pittsburgh area, the Pennsylvania Railroad, the New York Central (which controls the Pittsburgh & Lake Erie), and the Baltimore & Ohio. Mr. Richard K. Mellon, Chairman of the Board of the Mellon National Bank and Trust Company, has been a Director of the Pennsylvania Railroad since 1934 and is one

of the proposed Directors of the Pennsylvania New York Central Transportation Company, if the Pennsylvania is allowed to merge with the New York Central.

Bay State requested the railroads to establish rates from Pittsburgh which would be related to the present rates from Buffalo to the Eastern base points. Instead, the railroads published reduced rates which were supposedly based on the McGraham formula.

Upon the filing of protests by various parties, the Commission suspended the reduced Pittsburgh rates pending investigation. After hearings, Division 2 of the Commission on February 24, 1964, found the reduced rates from Pittsburgh to the nine Trunk-line territory destinations, as well as reduced rates to New England which were included in the original proposal, just and reasonable and granted fourth section relief in connection with the rates to Syracuse and Utica. All of the reduced rates were made effective March 14, 1964. After unsuccessful attempts to secure reconsideration by the Division and review by the entire Commission, the State of New York and other parties brought actions in the United States District Court for the Western District of New York to set aside the Division's order. On December 21, 1964, the Commission on its own motion reopened the proceedings for reconsideration and the court action was stayed by stipulation. On reconsideration by the entire Commission, the rates to New England were found not shown to be just and reasonable and were ordered canceled, but the reasonableness of the reduced rates from Pittsburgh to the nine Trunk-line destinations and the grant of fourth section relief were reaffirmed. *Grain, Pittsburgh, Pa. to Eastern Base Points*, 325 I.C.C. 669 (1965). Amended complaints were filed, briefs submitted, and oral argument held before the statutory three-judge district court which, on July 14, 1966, dismissed the complaints.

The Questions Are Substantial

The questions presented by this appeal arise from the unprecedented action of the Commission in finding "just and reasonable and otherwise lawful" reduced rates on grain and grain products from Pittsburgh to nine base points in Trunk-line territory, which were published to induce the establishment of a grain-milling industry at Pittsburgh, when the evidence showed that the rates are lower than those from all points adjoining Pittsburgh and on a lower basis than the rates from most C.F.A. territory origins to the same destinations; that there is no competitive necessity for the reduced rates; that they will result in a diversion of traffic from the railroads to the barge lines; that they will result in a loss of net revenues to the railroads; that they will unduly prefer Pittsburgh and unduly prejudice Buffalo; and that they will violate the National Transportation Policy.

I. The district court erred in relying on the judgment of the Commission without making any pertinent finding as to whether such judgment was based upon substantial evidence of record.

In this section, we shall direct our remarks jointly to the first two questions presented by this appeal.

Section 15(7) of the Interstate Commerce Act (49 U.S.C. § 15(7)), provides that "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." Although the Commission made the ultimate finding that the reduced rates "are just, reasonable, and otherwise lawful," the grounds or evidence on which it relied in reaching this conclusion are far from clear.

For example, the Commission compared the reduced local rates from Pittsburgh with the ex-lake rates from

Buffalo to the same destinations (325 I.C.C. at 672), and evidently gave *some* weight to such comparisons.* Later in its report, however, the Commission properly stated that "the rates from Buffalo are depressed as a result of various competitive factors existing at that point" and therefore "are not a proper standard for determining the reasonableness of other rates" (325 I.C.C. at 677). Another example of the smog which surrounds the Commission's reasoning is the statement that the reduced rates from Pittsburgh are based on the McGraham formula (325 I.C.C. at 672), contrasted with the later reference to the fact that the reduced rates from Pittsburgh "are on a lower basis than rates from most Central Freight Association origins, and are also lower than rates from numerous nearby points in Pennsylvania and Ohio, and from Wheeling, W. Va." (325 I.C.C. at 679), thereby casting serious doubt on whether the McGraham formula was, in fact, the basis for the reduced rates from Pittsburgh.

Such inconsistencies in the Commission's decisional process are symptomatic of the railroads' failure to meet their burden of proof under section 15(7). However, we submit that the one single error which above all others stands out in the Commission's findings, and in the treatment accorded those findings by the court below, is the disposition of the essential question of whether the carriers proposing the reduced rates would be better off from a net-revenue standpoint with the reduced rates than without them.

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* The defendants below could not agree to what extent the Commission relied upon the Buffalo-Pittsburgh rate comparisons. The intervening Pittsburgh interests contended the Commission in no way relied upon such rate comparisons (Br., p. 10), the intervening railroad defendants stated that it properly relied upon such rate comparisons (Br., p. 10), and the Government argued that although the Commission made such comparisons, they do not prove the reasonableness of the Pittsburgh rates (Br., p. 4).

The Commission delineated the requirements for a minimum reasonable rate in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 534 (1945):

> "Whether a rate is below a reasonable minimum depends on whether it yields a proper return; *whether the carrier would be better off from a net-revenue standpoint with it than without it;* whether it represents competition that is unduly destructive to a reasonable rate structure and the carriers; and whether it otherwise conforms to the national transportation policy and the rules of ratemaking declared in the act of 1940." [Emphasis supplied.]

The Commission acknowledged the applicability to the instant proceeding of the *New Automobile* criteria, and, despite appellant's assertions, concluded that the net-revenue criterion, emphasized above, had been satisfied (325 I.C.C. at 678).

The argument was made by appellant to the district court that an improvement in net revenue was an element of a minimum reasonable rate (Pl. Br., p. 20), that it therefore was an element of the carrier's burden of proof under section 15(7) (Pl. Br., p. 21), and that the carriers had failed to meet this burden (Pl. Br., p. 25).

The Commission was under no compunction to settle upon the particular definition of a minimum reasonable rate that it set forth in the *New Automobiles* case. It need not have chosen the particular criteria it chose, nor need it have placed those criteria in the conjunctive giving controlling weight to each.

But it did so, presumably because in its expert judgment that was the appropriate manner in which to give meaning to the requirements of section 15(7). And having chosen these criteria, neither the Commission nor the court below was at liberty to depart from them. *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407 (1942).

However, that is precisely what the district court did. The court below had before it a case wherein the Government openly admitted that the Commission's decision must stand or fall on the question of whether the involved rates would benefit the carriers' net-revenue position;* as can be seen, the court had before it a case in which the Commission's affirmative finding on this specific criterion of a minimum reasonable rate was acknowledged by the Government to be the "thrust of the Commission report." Yet the court deliberately failed to examine this admittedly crucial Commission finding (App. A6), except to turn to the familiar statement that:

> ". . . the plaintiffs have too onerous a task when they ask us to overrule the combined judgment of the railroads and the 'tribunal appointed by law and informed by experience'." (App. A7.)

Now, we agree that there are instances where a reviewing court is entitled, if not required, to rely on the "judgment of the . . . tribunal appointed by law and informed by experience," but those instances exist only where the basic finding of the Commission—the exercise of judgment upon which judicial reliance is placed—is supported by subsidiary findings based upon substantial evidence of

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* At the oral argument before the three-judge court, the following exchange occurred:

> "Mr. Goodman [for the Government]: . . . As Mr. Myskowski [for appellant] added, during the course of his argument, as I understood it, the Commission's decision must stand or [f]all on whether the filing of these proposed rates out of Pittsburgh will benefit the carriers' net revenue. This is the basic thrust of the Commission's report, that these proposed rates will indeed benefit the carriers, the railroads' net revenue.
>
> "Judge Friendly: Do you agree with him that if the Commission fails on that, you lose the lawsuit?
>
> "Mr. Goodman: I think I would agree with him on that, yes, because this is the rationale of the Commission's decision that unless the carriers' net revenues are benefited, at least that they are no worse off, that the Commission's decision must fall." [Oral Arg. Tr., pp. 52-53.]

record. *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, 484 (U.S.D.C. D. Ore., 1955, opinion supplemented 134 F. Supp. 210).

Nowhere in the court's opinion is there any examination of whether or not the Commission's finding that the carriers would be better off with the proposed rates than without them was, in fact, based upon substantial evidence. The court's reliance on the Commission's judgment therefore was in error.

The absence of reference by the district court to proper subsidiary findings by the Commission is particularly notable and important in light of the court's concession that there was "apparent force" to the argument that the Commission had failed to consider the facts presented to it by appellant.

In this context the court virtually conceded that the Commission had failed to consider that the carriers' proof "looked only to Bay State's present shipments of 100,000 cwt. of flour into Pittsburgh and ignored other movements of flour from Bay State and competing midwestern mills which may be displaced by barge movements of grain to mills at Pittsburgh stimulated by new rates" and that "in its estimate of countervailing benefits from the new rates, the Commission failed to consider that flour milled from grain shipped into Pittsburgh by rail would move east not under the new rates but on low transit balances." (App. A7.)

The fact that the Commission did ignore these considerations should not have been glossed over by the court, for the question of whether the Commission has disregarded relevant evidence is pivotal to the question of whether the Commission's ultimate finding rests upon substantial evidence. *Chicago & E.I.R. Co.* v. *United States*, 107 F. Supp. 118, 126 (U.S.D.C. S. D. Ind., 1952), affirmed 344 U. S. 917.

II, The district court erred in concluding that the proponent carriers had met their burden of proof under Section 15(7).

In the final analysis, all the district court had to say concerning the Commission's disregard of relevant facts was:

> "If fault can be found with the Commission's predictions in some respects, it can also be found with the plaintiffs'." (App. A8.)

Deficiencies in the Commission's "predictions" should not be judged or excused by faults which (for the sake of argument) are claimed to exist with the plaintiffs' predictions if the Commission's deficiencies go, as they do here, to the absence of proper subsidiary findings. Once the Commission had failed to consider the relevant facts presented by the opponents its expert judgment was destroyed.

It is not within the province of the court to predict what the Commission might have concluded in its expertise had there been a proper evidential foundation for reliance on the Commission's judgment. The Commission chose, by its own admission, to rest its decision o the net-revenue criterion of a reasonable minimum rate; its action must be upheld, if at all, only on that ground. *Burlington Truck Lines* v. *United States*, 371 U. S. 156 (1962); *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194 (1947).

The proper answer if the record failed to contain sufficient evidence to satisfy the Commission's selection was to set aside the Commission's order or to require the carriers to produce additional and more satisfactory evidence, *Pacific Inland Tariff Bureau, supra*, and not to relieve the carriers of their burden of proof under section 15(7) with an irrelevant and speculative dissertation on the appellant's predictions.

CONCLUSION

For the foregoing reasons, probable jurisdiction of the appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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Appendix A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 11,055

STATE OF NEW YORK, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Walter J. Myskowski, Washington D. C. (Louis J. Lefkowitz, Attorney General Dunton F. Tynan, Assistant Solicitor General, Ruth Kessler Toch, Acting Solicitor General, and Matthew A. Tiffany, Assistant Attorney General, on the brief), for plaintiff State of New York.

Joseph A. Nicosia, Assistant Corporation Counsel, Buffalo, N. Y. (Anthony Manguso, Corporation Counsel, on the brief), for plaintiff City of Buffalo.

Robert W. Tills, Buffalo, N. Y. (Norman A. Stiller, County Attorney, on the brief), for plaintiff County of Erie.

Thomas P. McMahon, Buffalo, N. Y., for plaintiff Buffalo Industrial Progress Council.

Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. (Edwin M. Zimmerman, Acting Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, John T. Curtin, United States Attorney, Robert W. Ginnane, General Counsel, Interstate Commerce Commission, on the

brief), for defendants United States of America and Interstate Commerce Commission.

D. M. Tolmie, Philadelphia, Pa. (R. J. Murphy, T. L. Samuel, and Ellsworth A. Van Graafeiland on the brief), for railroads intervening as defendants.

Eugene T. Liipfert, Washington, D. C. (Walter E. Alessandroni, Attorney General of Pennsylvania, Edward Friedman, Deputy Attorney General, Joseph Martin Gelman, Special Assistant Attorney General, and Clarence R. Runals, on the brief), for Commonwealth of Pennsylvania, Port Authority of Alleghany County, Regional Industrial Development Corporation of Southwestern Pennsylvania, and Bay State Milling Company, Inc., intervening defendants.

Before FRIENDLY, Circuit Judge, and BURKE and HENDERSON, District Judges.

FRIENDLY, Circuit Judge:

This action by the State of New York, the County of Erie, the City of Buffalo, and the Buffalo Industrial Progress Council puts in question the validity of a report and order of the Interstate Commerce Commission ruling that reduced rates initiated by certain railroads from Pittsburgh to nine destinations in trunkline territory were just and reasonable, and granting fourth section relief as to two such destinations. Fully recognizing the seriousness of the case to the plaintiffs, and appreciating the earnestness of the arguments by their able counsel, we are unable to find any basis for invalidating the Commission's order.

Buffalo has long enjoyed favorable ex-lake rail rates on grain and grain products to points in trunkline and New England territories—these having been made to enable the rails to compete with all-water routes from the mid-west. See Buffalo Grain Cases, 46 I.C.C. 570 (1917). As a result of these favorable rail rates on grain products

and the low lake steamer rates from the grain shipping ports in the midwest, Buffalo has become the greatest flour milling center of the country; in 1962 it produced almost 28,000,000 hundred-weight of flour, a figure exceeding the combined output of its two closest rivals, Kansas City and Minneapolis.

Some years ago Pittsburgh interests, disturbed by a stand-still in industrial growth and an adverse trend in population, commissioned a study as to that area's economic development. Attention was directed to the possible creation of a milling industry, taking advantage of the low grain rates available for barge movements on the Missouri and Mississippi Rivers and thence up the Ohio. Inquiries led to a display of interest by a midwestern concern, Bay State Milling Company, which had been marketing in western Pennsylvania bakery flour produced at its Minnesota and Kansas mills. However, Bay State was unwilling to construct a mill to serve only the local market, and investigation showed Pittsburgh was under prohibitive disadvantages in freight rates to the east as compared with Buffalo.[1] As a result of discussions the carriers, while declining to make the full reductions sought, proposed a new schedule of rates from Pittsburgh to nine base destinations in trunkline and two in New England territories. These rates, constructed according to the so-called "McGraham formula" for points in Central Freight Association Territory, under which the rate from Pittsburgh to New York is 60% of the Chicago-New York rate and rates to other destinations are determined by fixed percentages or arbitraries above or below this figure, see Cooperative Grain League Federation Exch. Inc. v. Akron, C. & Y. R. R., 323 I.C.C. 174, 179-82 (1964), considerably reduced the disparity between the competing cities, al-

[1] This was true not only at points where Buffalo had a slight mileage advantage, e.g., 49.5¢ vs. 37.5¢ per cwt. to New York, but even where a substantial mileage advantage lay with Pittsburgh, e.g., 46.5¢ vs. 37.5¢ per cwt. to Baltimore. No traffic moved under the Pittsburgh rates and their propriety had not been challenged.

though in only two instances were Pittsburgh's rates to be lower than Buffalo's.[2]

On the protest of the Buffalo interests, the Interstate Commerce Commission suspended the new Pittsburgh rates pending investigation. In February 1964 Division 2 of the Commission found the proposed rates just and reasonable, and granted the fourth section relief sought by the railroads in connection with rates to two destinations. Grain, Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218. After unsuccessful attempts to secure reconsideration by the Division and review by the full Commission, the New York interests brought this action to set aside the Division's order. In December the Commission reopened the proceeding on its own motion, and this action was stayed by stipulation. After reconsideration by the entire Commission, the rates to the two New England destinations were held not shown to be just and reasonable and were ordered to be canceled; the reasonableness of the rates to the nine trunkline destinations and the grant of fourth section relief were reaffirmed. Grain, Pittsburgh, Pa., to Eastern Base Points, 325 I.C.C. 669 (1965).[3] Plaintiffs thereupon filed amended complaints.

The Commission found that the proposed rates from Pittsburgh to the nine trunkline destinations would in almost every instance exceed "out of pocket costs" as developed by the carriers, which computation the Commission considered proper.[4] The term "out-of-pocket costs" is

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[2] These were rates to Cumberland, Md., only 142 miles from Pittsburgh as compared with 321 from Buffalo, and to Norfolk, Va., 505 miles from Pittsburgh as against 619 from Buffalo. Although Baltimore and Philadelphia are also nearer Pittsburgh than Buffalo, the proposed rates favored the latter city in both instances.

[3] Two Commissioners dissented from the disapproval of the rates to New England; two others did not participate.

[4] The sole exception was a movement of 70,000 pounds of feed to Albany in covered hopper cars, which the Commission properly did not consider of controlling importance since the rates on all other shipments were compensatory and the record indicated that feed was generally shipped in boxcars rather than hopper cars. Use of protestants' computations would add only one other exception—the same type of movement to Utica.

rather misleading since it includes "much more than a layman might think from the description," New York Central R.R. v. United States, 207 F. Supp. 483, 493 n. 8 (S.D.N.Y. 1962), to wit, the "variable" portion of operating expenses, some 80%, plus a return on investment after taxes of 4% on equipment and 2% on road property. See, for a further explanation, New York, N. H. & H. R.R. v. United States, 199 F. Supp. 635, 640 & n. 11 (D. Conn. 1961), modified *sub nom.* I.C.C. v. New York, N. H. & H. R.R., 372 U. S. 744 (1963). In many instances the excess of the proposed rates over out-of-pocket costs was substantial; for the three largest markets the ratio of rates to costs ranged, depending on the type of car and the minimum loading, from 123% to 165% for Baltimore, from 107% to 141% for New York, and from 116% to 154% for Philadelphia.

Recognizing as they must that the findings as to costs must be respected as within the Commission's competence, plaintiffs contend these are legally insufficient. They argue that "in the absence of special circumstances, such as competition, rates should return full costs to avoid placing an undue burden on other traffic," and point to evidence that freight traffic as a whole must produce revenues of 139% of out-of-pocket costs in order to enable the railroads to recover their constant costs and the deficits incurred in L.C.L. and passenger traffic and earn a return on their investment. Here, they say, the reduced rates from Pittsburgh not only are not required to meet the competition of another form of carriage but will promote it by substituting a movement of grain to Pittsburgh by barge for the existing movement of midwestern flour by rail; far from enhancing net rail revenues, as when rates are reduced to the out-of-pocket level to attract traffic from a motor or water carrier or to prevent diversion, the railroads will be worse off with the new rates which will permit a milling industry to be created at Pittsburgh than with the old ones that prevented it. They cite as further evidence of

the merit of their predictions the unusual intervention of the Waterways Freight Bureau in support of proposed reductions in rail rates.

In contrast to the "lower than necessary" claim frequently made in cases of inter-modal competition, plaintiffs' argument is not that the traffic will move at a rate which makes a larger contribution to fixed costs but that the railroads would be better off if the movement did not occur. Still we will assume in plaintiffs' favor, although without in any way deciding, that—considerations of undue preference and prejudice apart—the Commission could lawfully have disapproved the proposed rates if it found the facts to be as they urge.[8] But we have the gravest doubt whether, in empowering the Commission to proscribe a rate as unduly low, Congress meant to *require* it to examine the wisdom of the proponents of rates yielding more than out-of-pocket costs when there is no threat of injury to competing carriers or consequently of re-

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[8] Plaintiffs called attention to the writer's statement in New York Central R.R. v. United States, *supra*, 207 F. Supp. at 495:

> "We do not doubt the power of the Commission, on proper findings, to proscribe as too low a rate which, although covering long term out-of-pocket costs, fails to meet fully distributed ones. Some traffic must pay for the 'non-variable' portion of operating expenses and property taxes and meet the deficits occasioned by traffic (such as the passenger business) that does not pay its way. If the Commission thinks a particular carrier should not haul particular traffic at a rate that will not contribute to such expenses, that is a judgment competent for the Commission to make. It is no answer that the individual carrier will be better off with the traffic than without it; the Commission must consider the entire transportation system and may, on a proper showing, utilize the minimum rate power to maximize profits for the system, as long as it does not require more than what would be a reasonable maximum rate."

However, this must be read in the context of a situation where some railroads were seeking to establish rate parity for a more distant point to the disadvantage of the net revenue position of other railroads serving nearer points—a problem rather different from the proposal here to provide rates more nearly in accord with mileages from the respective points.

taliatory action by them, the traffic will not move at higher rates, and the sole substantial claim is that because of effects on other traffic the proponents would be better off if the new movement did not occur. Indeed the implication of § 15a(2) which lists "the effect of rates on the movement of traffic" as a factor to which the Commission must give "due consideration" is to the contrary. The situation would seem to be one where, in the absence of evidence that the carriers were reluctantly yielding to improper pressures, the Commission would be warranted, if so advised, in deferring to managerial judgment without further inquiry. See Pig Iron from New York Points to Detroit, 296 I.C.C. 747, 752 (1955).

However, we need not decide that question, since both Division 2 and the full Commission considered and rejected plaintiffs' contention that the new rates would disadvantage the railroads which had proposed them. Plaintiffs say the Commission was as wrong on this as the carriers. They are particularly critical of the statement that the quarter of Bay State's grain requirements which Bay State predicted it would move to the Pittsburgh mill by rail, estimated at 250,000 cwt. per annum, was "far in excess of the present flour movement to the Pittsburgh area," 325 I.C.C. at 678; they say with apparent force that this comparison looked only to Bay State's present shipments of 100,000 cwt. of flour into Pittsburgh and ignored other rail movements of flour from Bay State and competing midwestern mills which may be displaced by barge movements of grain to mills at Pittsburgh stimulated by the new rates. They note also that in its estimate of countervailing benefits from the new rates, the Commission failed to consider that flour milled from grain shipped into Pittsburgh by rail would move east not under the new rates but on low transit balances. But the plaintiffs have too onerous a task when they ask us to overrule the combined judgment of the railroads and the "tribunal appointed by law and informed by experience." Illinois Central R.R. v. I.C.C., 206 U. S. 441,

454 (1907). If fault can be found with the Commission's predictions in some respects, it can also be found with the plaintiffs'. One need hardly go beyond the initial illogic of arguing that the railroads will fare better under the depressed ex-lake rates from Buffalo than with the higher rates proposed from Pittsburgh although, for most destinations, the latter yield considerably higher ratios to out-of-pocket cost. See 322 I.C.C. at 237, 242, Apps. B and D. Since most of the grain milled at Buffalo arrives there by water, all the dire effects predicted from the Pittsburgh rates would thus occur in even greater measure if the Buffalo mills succeeded in displacing an equivalent amount of midwestern flour. Still more adverse consequences would ensue for the railroads if failure to develop a milling industry at Pittsburgh should result in the growth of mills in the large seaport markets to which grain can move by all-water routes. Finally, the new Pittsburgh rates to many destinations show a more favorable ratio to out-of-pocket costs than the proportional rates on which flour moves from Chicago and St. Louis, although, of course, for a shorter haul. See 322 I.C.C. at 237, 243-44, Apps. B and D. In sum the Commission had substantial basis for finding the claim of adverse effect on net revenues to be too speculative to warrant disapproval of rates necessary for the movement of traffic, exceeding out-of-pocket costs, and having no harmful effect on any competing carrier.

As to plaintiffs' other and less important contentions we are also satisfied with the Commission's disposition.

Judgment will be entered dismissing the complaint.

HENRY J. FRIENDLY
U. S. C. J.

HAROLD P. BURKE
U. S. D. J.

JOHN O. HENDERSON
U. S. D. J.

July 14th, 1966.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 11,055

STATE OF NEW YORK, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*

SIR:

Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 14th day of July, 1966, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 14th day of July, 1966.

Dated: Buffalo, New York, July 14, 1966.

ROLAND E. LOGEL, Clerk
U. S. District Court
U. S. Courthouse
Buffalo, New York 14202

Appendix B.

The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

"NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 1 * * * (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give,

or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 4 (1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the

establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carries of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Sec. 15 * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby

a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but in the case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Sec. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

JUDICIAL CODE

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

28 U.S.C. § 2101 (b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. June 25, 1948, c. 646, 62 Stat. 931.